

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOHN W. WILSON)	
Claimant)	
VS.)	
)	Docket No. 1,063,947
PRICE TRUCK LINE, INC.)	
Respondent)	
AND)	
)	
PRAETORIAN INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant requests review of the June 21, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes.

APPEARANCES

Kenton D. Wirth, of Wichita, Kansas, appeared for the claimant. Anton C. Andersen, of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board adopts the same stipulations and has considered the same record as did the ALJ, consisting of the transcript of the April 30, 2013, Preliminary Hearing with exhibits attached, and the documents of record filed with the Division.

ISSUES

The ALJ found claimant failed to sustain his burden of proof of personal injury by accident arising out of and in the course of his employment with respondent and denied claimant's preliminary hearing requests.

Claimant appeals, requesting review of whether he sustained personal injury by accident arising out of and in the course of his employment with respondent. Claimant

argues there is no reason to believe he fell due to an unknown cause and there are numerous reasons to believe he was knocked down by the swinging trailer doors, including among other things, the weather conditions at that time, the nature of his injuries to both the front and back of his head and how EMS found the accident scene, which prompted them to believe claimant had been struck by the swinging doors. Therefore, it is more probably true than not that his accident arose out of his employment with respondent and he should be awarded compensation and requests medical benefits and temporary total disability benefits.

Respondent argues the Order should be affirmed, as claimant failed to prove how he was injured, and unexplained falls are not compensable.

FINDINGS OF FACT

Claimant began working for respondent in January 2012. This was claimant's second time working for respondent. He testified that his job was to log the load of each of the trucks and then he would drive the truck away from the dock from one plant to another. There were also times where the truck would be empty and he would pull it up to the dock to be loaded. Claimant did not do any over-the-road driving and strictly limited his driving to the city limits of Winfield, Kansas. Claimant is alleging he sustained an injury at work on April 14, 2012. He was 76 years old at the time. He cannot completely recall the details of the accident, and testified that he does not remember what he was doing on the day he was injured. It is speculated that he had backed a trailer up to be loaded and was preparing the trailer to be pulled away from the dock when a gust of wind blew the doors on the trailer door out while he was trying to latch them and one of the doors hit him in the head, knocking him unconscious. Claimant was in a coma for six days after the accident. When he came to he was in the hospital, but at first he thought he was at home. Claimant doesn't remember anything from that day.

EMT records indicate that claimant was found sitting in the parking lot on the rear passenger side of a tractor trailer. The rear doors of the tractor trailer were swinging heavily in the wind and the theory was that claimant had been struck in the head by the doors. Claimant's head was bleeding and he was unable to follow commands, so he was transported to the hospital.

Claimant testified that before the accident, he was in good shape. Since the accident, he can no longer hear in his left ear and has a hearing aid in his right ear which gives him 10 percent hearing capability. Claimant had a hearing aid in the right ear before the accident. He has also lost his sight since the accident and has low back pain, left side pain from the thigh to the calf and pain in both shoulders. Claimant attributes all of these problems to the traumatic brain injury he sustained in the accident. Finally, claimant reported having problems with his pacemaker after the accident, and a vestibular disorder.

Claimant testified that after the April 14, 2012, incident he fell two other times hitting his head both times. The first fall was at the facility where he was recuperating and the other was at his home. Claimant fell when he lost his balance.

Louise Underwood, a friend of claimant's, has known claimant since about 1976. She used to work for claimant and he is her children's godfather. Ms. Underwood testified she first learned of claimant's accident the night of April 14, 2012, when she received a call from Lonnie Smith, a lead worker at Rubbermaid.

Ms. Underwood testified that after the accident, claimant was in the hospital in a coma for six days and then was moved to a rehab hospital and then to a nursing home facility to continue his rehab. She doesn't recall claimant having any memory or balance problems before the accident. After the accident, she noticed claimant having problems with his short-term and long-term memory. For example she stated that claimant would be thinking something and believe that he is saying what he is thinking, but wasn't, and he must be reminded of everything and he has had a change in his personality. She testified that claimant used to be fun and now he is angry and gets aggravated and frustrated because of his memory problems. She testified that claimant stumbles every once in a while, and runs into things. She also stated that he is having a hard time hearing to the point where he has to have people repeat themselves very loudly in his ear. Claimant is receiving treatment for his injuries, and Ms. Underwood has been going with claimant to a lot of his hospital and doctor visits.

At the request of his attorney, claimant met with board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., for an examination on February 28, 2013. His chief complaints were memory loss; occasional dizziness; neck pain with pain from the neck to the low back and down the left leg; complete loss of hearing in the left ear and decreased hearing in the right ear; vision changes in both eyes; and increased pain in the neck, low back, and left leg with weather changes. Dr. Murati described claimant as a poor historian and was unable to get a clear picture of what happened to him. He noted claimant had a brief history of low back problems in the 70s or 90s, for which he had a discectomy and was then able to work with no problems. He also reported problems with his hearing prior to the accident. Claimant admitted seeing a chiropractor over the years, but denied any preexisting injuries to his head, eyes, ears, neck, and upper back prior to the April 14, 2012, injury.

Dr. Murati opined claimant had a traumatic brain injury and post concussion syndrome; trigeminal neuropathy; complete loss of hearing in left ear, diminished on the right; anosmia; bilateral diplopia; vestibular disorder; left shoulder rotator cuff sprain vs. tear; myofascial pain syndrome affecting the bilateral shoulder girdles extending into the cervical and thoracic paraspinals; and low back sprain. He went on to opine that claimant is permanently unemployable and would never be expected to return to gainful employment. He opined that his diagnoses of claimant are, within reasonable medical

probability, a direct result of the work-related injury that occurred on April 14, 2012, during claimant's employment with Truck Price Line.

He recommended giving claimant time for his brain to heal in regard to the post concussion syndrome; for the vestibular disorder, he recommended referral to an ENT for a nystagmogram and appropriate treatment; for the left shoulder rotator cuff sprain vs. tear, he recommended cortisone subacromial joint injections, and, based on the results, an MRI, possible physical therapy and anti-inflammatory and pain medication. For myofascial pain syndrome affecting the bilateral shoulder girdles extending into the cervical and thoracic paraspinals, he recommended physical therapy with myofascial pain release techniques, trigger point injections, anti-inflammatory and pain medication and Zanaflex to reduce muscle spasms. For the low back pain, he recommended an MRI of the lumbar spine to rule out any disc pathology and recommended physical therapy and anti-inflammatory and pain medication. Dr. Murati opined that due to claimant's loss of vision and hearing he should not be operating motor vehicles and should be evaluated by a neuroophthalmologist.

Dr. Murati opined the following regarding prevailing factor:

. . . he was in his usual state of health prior to this work related injury and was able to perform his job without difficulty. The claimant admits to having some hearing loss prior to this work-related injury and states that he was able to converse without much difficulty prior to his work-related injury. Since his work related injury he has such poor hearing that general conversation is extremely difficult. He has significant clinical findings that have given him diagnoses consistent with his described accident at work. Therefore, it is under all reasonable medical certainty and probability, the prevailing factor in the development of his conditions is the accident at work.¹

Claimant met with Dr. Kumar Dalla on July 30, 2012. Dr. Dalla acknowledged claimant's history of diabetic retinopathy and preretinal fibrosis in the right eye. He opined that after the April 14, 2012, head trauma, claimant had a subdural hematoma that resolved, but left him with difficulty reading, finding words on a page and some increasing distortion. Dr. Dalla found claimant to have 20/80 vision in the right eye and 20/50 vision in the left eye. The diabetic retinopathy appeared stable. He did find claimant to have preretinal fibrosis in the right macula. He felt claimant's vision problems were most likely from his traumatic head injury.

Claimant was seen at the Kansas Cardiac Clinic on June 9, 2012. It was determined there may be some injury to the tissue surrounding claimant's pacemaker from the fall. Claimant believes the pacemaker is falling out of his right chest wall due to the

¹ P.H. Trans., Cl. Ex. 1 at 9 (Dr. Murati's Feb. 28, 2013, IME Report).

accident. In September 2012, claimant was treated by Dr. Keck Hartman for an infection around the site of his pacemaker.

Claimant has had a pacemaker since he was 48 years old. He last had it replaced two or three years ago (2010 or 2011). This last replacement should last at least six and a half years. Claimant had a staph infection in the site about his pacemaker prior to the April 14, 2012, accident.

Claimant considered himself to be a full-time employee of respondent and had actually worked for respondent almost 28 years over two different occasions. Claimant testified that before the accident his health was great, although, he was on a variety of medications before the accident, some of them for diabetes. He began insulin injections for his diabetes after the accident. Claimant has had diabetes for more than 10 years. He doesn't believe he had any medical problems before the accident that would limit his activities. He was fully capable of taking care of himself.

Claimant does not recall the events that took place on April 14, 2012. He testified that everything he knows from that day he learned other people, since there were no actual witnesses. Claimant testified that his job was to drive the trucks to different locations, all within a two mile radius. Depending on the location of the trailers, the doors would be open or closed. The doors were usually open if the truck was backed up to the dock. Claimant remembers other things from 2012, but not the accident.

Claimant denies ever having a fainting spell before April 14, 2012. He admits to a prior back surgery a number of years ago. He testified that he believes the wiring issues he is having with his pacemaker were caused by the accident. He attributes his dislodged pacemaker to the accident. Claimant also believes his back, shoulder and leg issues are related to the accident. Claimant also attributes his vision loss and increased hearing loss to the accident. Claimant fell two more times while he was rehabilitating after the accident.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(d)(f)(1) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event , usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

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(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

K.S.A. 2011 Supp. 44-508(f)(2)(B) states:

(f)(2)(B) An injury by accident shall be deemed to arise out of employment only if:

- (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
- (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2011 Supp. 44-508(f)(3)(A)(iv) states:

(f)(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

- (i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;
- (ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;
- (iii) accident or injury which arose out of a risk personal to the worker; or
- (iv) accident or injury which arose either directly or indirectly from idiopathic causes.

There is significant speculation in this record as to what led to claimant's accident. Unfortunately, there is no definitive proof of how claimant was injured. His significant head injury could have occurred when the wind blew a door into him. It could have occurred when claimant fell to the ground or fainted. Nothing in this record answers that question. Unfortunately, claimant's injuries were so significant he cannot remember many aspects of that day, let alone how the accident happened.

In 2011, the Kansas legislature significantly modified the Kansas Workers Compensation Act (Act), limiting an injured workers ability to collect benefits for work related accidents. One of these modifications prohibits the collection of benefits for idiopathic, or unexplained accidents. Prior to the enactment of the new Act, injuries which were attributable to personal conditions of an employee were not compensable. However,

according to Larson's², the majority of jurisdictions would compensate workers injured in unexplained falls, based upon the analysis that an unexplained fall is a neutral risk and would not have otherwise occurred at work if the claimant had not been working. Kansas fell within this majority. That all changed with the 2011 modification of the Act.

Here, claimant suffered a fall of unknown origin or cause. Claimant was found lying on the ground with a large hematoma on the back of his head. There was no evidence whether claimant was struck by something or someone or simply fell, striking his head. Since the accident, he has fallen more than once, striking his head on more than one occasion. This accident arose from idiopathic causes. Under the revised Act, it is excluded from coverage. While this result may seem harsh, the legislature has spoken. The denial of benefits by the ALJ is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has failed to prove the accident arose out of his employment. It is, instead, an idiopathic accident and thus, not compensable.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated June 21, 2013, is affirmed.

² 1 Larson's Workers' Compensation Law, Sec. 7.04[1] (2004).

³ K.S.A. 2012 Supp. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of September, 2013.

HONORABLE GARY M. KORTE
BOARD MEMBER

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Nelsonna Potts Barnes, Administrative Law Judge